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No. 89-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

BICKERSTAFF CLAY PRODUCTS CO., INC. and NATIONAL LABOR RELATIONS BOARD,
Respondents

APPENDIX TO PETITION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7609

BICKERSTAFF CLAY PRODUCTS COMPANY, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

April 27, 1989

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Alabama Case)

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

This case is before the court on the petition of Bickerstaff Clay Products Company, Inc. ("Bickerstaff" or "the Company") for review of an order by the National Labor Relations Board ("NLRB" or "the Board") on September 30, 1987, and the Board's cross-application for enforcement. The Board found that Bickerstaff violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. Sec. 158 (a)(1) and (5), by withdrawing recognition of Laborers'

Local Union No. 246 ("the Union") as the representative of the Company's employees, by failing and refusing to furnish the Union with certain information requested, and by failing and refusing to execute a collective-bargaining agreement found to have been reached on April 8, 1986.[1]

The Board's order requires the Company to cease and desist from these unfair labor practices. As affirmative relief, the order requires the Company to recognize and bargain with the Union, and to furnish the Union with the information it sought concerning the bargaining unit. Additionally, the Board ordered the Company, upon request, to sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between the Company and the Union, and to give retroactive effect to its terms and conditions; or, if no such request is made by the Union, to bargain for a new collective-bargaining agreement and sign any agreement reached. Finally, the order requires the Company to post copies of a remedial notice to employees. We decline to enforce the Board's order.

BACKGROUND

Bickerstaff makes and sells brick and tile products. The Company currently operates four manufacturing plants in Russell County, Alabama.

The history of labor relations between Bickerstaff and the Union began in 1965 when the Union petitioned for recognition as the bargaining representative at three of the Company's manufacturing plants. Separate elections were held at each manufacturing plant. Although the Union won only one election, the present management of Bickerstaff voluntarily recognized the Union as the bargaining representative of the employees in all of the Bickerstaff plants in Russell County, Alabama. Since

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[1] The Board's order is reported at 286 NLRB No. 27 (1987).

1966, the Union and Bickerstaff have successfully negotiated successive labor agreements without a work stoppage until November 11, 1985. The last bargaining agreement between Bickerstaff and the Union which by its terms was to expire on October 31, 1985, was extended by mutual agreement until November 10, 1985. The parties were unable to consummate an agreement, however, and the Union called a strike which began on November 11, 1985.

In September 1985, negotiations commenced to replace the parties' collective-bargaining agreement expiring on October 31, 1985. From September 17, 1985 to the first week of November, Bickerstaff and the Union held ten bargaining sessions prior to the strike. Negotiations were not productive, and on November 6, the Company made a final offer of contract terms.[2] The membership of the Union rejected the offer on November 10, and voted to go on strike the next day at the Company's four brick production facilities. Out of a total collective-bargaining unit of 304 employees, 195 participated in the strike and another 109 did not strike. Beginning on November 11, the Union picketed the Company's Phenix City office and plants.

There were four meetings between union and company representatives after the strike commenced on No-

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[2] Appellant's chief operating officer, President Herbert Fuller, testified that in negotiations before November 6, 1985, the Company and the Union "had been unable to reach an agreement on only a few minor points such as probationary period, bulletin board use, call in pay . . . (but) we were still drastically apart on the economic issues," such as wage increases, increased pensions and insurance contributions and holidays. For instance, Bickerstaff's final offer included an across-the-board hourly wage increase of twenty cents per year for the three-year contract. The Union's final position was an hourly wage increase of forty-five cents per year for the same time period. As found by the Board, Bickerstaff's November 6 final offer covered all of the outstanding issues mentioned by Fuller and, in combination with the other issues previously agreed to by the Company and the Union, constituted a complete contract.

vember 11, 1985. On November 18, union and company negotiators met with a federal mediator, but no progress was made toward agreement on a new contract. The parties met again on December 9, 1985, but to no avail. A private meeting was held on December 12, 1985 between the Company's Chief Executive Officer, Richard Bickerstaff, and a representative of the International Union. The Union and the Company had a final unsuccessful negotiation session on January 13, 1986.

On January 23, 1986, the Company advised the Union that negotiations were at an impasse and that the Company was instituting "wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985." [3] The Union did not respond and the Company heard nothing from the Union until April 8, 1986. By letter dated April 8, 1986, the Union informed the Company that it "accepted the final offer made by the Company on November 6, 1985," and offered unconditionally to have the striking employees return to work. In that letter, the Union asked for a listing of all employees currently working along with various matters regarding each working employee.[4] Then, on April 9, 1986, the Company wrote the Union:

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[3] The Company notified the Union by letter dated January 23, 1986, which stated in part:

> The Company is desirous of increasing wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985.
>
> After due consideration, we have concluded that negotiations are and have been at an impasse and accordingly, the Company will put its final proposal into effect as of January 27, 1986.

Thereafter, the Company effectuated an hourly wage increase of twenty cents and other benefits as proposed in its final offer.

[4] By April 8, 1986 letter, the Union wrote the Company as follows:

> This is to inform you that the Laborers' Local 246, affiliated with the Laborers' International Union of North America,

> This will acknowledge receipt of your letter of April 8, 1986 regarding your union and Bickerstaff Clay Products Company, Inc.
>
> Based upon facts and circumstances which have occurred since the strike at our client's plant, we seriously doubt that your union represents a majority of our employees. Under these circumstances we do not believe that we can recognize your union as the bargaining agent for our employees. Therefore, our last offer is no longer outstanding to your union and your offer to sign a collective bargaining agreement with our client is declined. Furthermore, your request for information about our employees is refused.

Thereafter, the Company refused to bargain with the Union.

The Union filed an unfair labor practices charge with the Board on April 11, 1986, alleging violations of Sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. Sec. 158(a)(1) and (5). The Board issued a complaint against the Company on May 16, 1986. Bickerstaff's

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AFL-CIO, has accepted the final offer made by the Company on November 6, 1985.

It is my understanding that the Company has implemented the terms of that final proposal on January 27, 1986. We will be available to meet and sign the Agreement on Monday, April 21, 1986 if this meets with your schedule....

Additionally, please forward to me a listing of all employees currently working at your Phenix City, Alabama operations. Along with their name, please include the following information: address, phone number, social security number, date of hire, job assignment, rate of pay, marital status, shift, and number of dependents.

By this letter we are offering an unconditional return to work for all striking employees and request you provide me with a listing of all employees you place on the preferential hiring list.

I look forward to seeing you on the 21st of this month.

answer denied any violations of the Act claiming that on the critical date (1) the Union was not representative of a majority of bargaining unit and (2) the Company entertained a reasonable good faith doubt of the Union's majority status. Administrative Law Judge Pargen Robertson ("the ALJ") heard the case on July 16, 1986. In his December 15, 1986 decision, the ALJ rejected the defenses of Bickerstaff and found the Company to be in violation of the Act.

Thereafter, Bickerstaff filed exceptions to the decision with the Board. The issue before the Board was whether there were sufficient objective indications to enable the Company to entertain a reasonable, good faith doubt that the Union represented the majority of its employees at the time the Company withdrew recognition. On September 30, 1987, the Board ruled that it did not and affirmed the ALJ's decision that Bickerstaff violated the Act by withdrawing recognition from the Union on April 9, 1986; by refusing to sign a collective-bargaining agreement with the Union; and by refusing to provide the Union with bargaining unit information. Bickerstaff filed a timely petition in this court to review and set aside the Board's decision. The Board then filed its cross appeal for enforcement. This court has jurisdiction pursuant to 29 U.S.C. Sec. 160(e) and (f).

STANDARD OF REVIEW

In reviewing an order issued by the NLRB, the courts must accept the Board's findings of fact, "if supported by substantial evidence on the record considered as a whole . . ." 29 U.S.C. Sec. 160(e). This general standard of review, however, eludes precise definition. As interpreted by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. at 477, 71 S.Ct. at 459. In searching "the whole record" for substantial evidence, a reviewing court "must take into account whatever in the record fairly detracts" from the Board's fact findings as well as evidence that supports it. *Id.* at 487-88, 71 S.Ct. at 464-65. *See Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir.1981). The court is not free to substitute its judgment for that of the Board simply because the court would have made a different choice had the matter been before it *de novo*. *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465. On the other hand, this court is not a "rubber stamp" or the enforcement arm of the NLRB, *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 866 (6th Cir.1982), and we must set aside the Board's decision when the court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 465.

WITHDRAWAL OF RECOGNITION

The Board's decision that the Company violated Sections 8(a)(1) and (5) of the NLRA flowed from its conclusion that Bickerstaff unlawfully withdrew recognition from the Union. The issue before this court is whether substantial evidence exists on the record as a whole to support the Board's decision.

A. The Legal Standards

The broad contours of the law in this area are well settled. Generally, a union that has been certified in a Board-conducted election or voluntarily recognized by an employer is entitled to a continuing presumption of majority status. Absent special circumstances, this presumption is irrebutaable for a one-year period following formal certification or voluntary recognition. *See Ray Brooks v. NLRB*, 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed.

125 (1954). After the expiration of the certification year, the presumption of the Union's continuing majority support continues but becomes rebuttable. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 859 (5th Cir. 1966); *NLRB v. Gulfmont Hotel*, 362 F.2d 588, 589 (5th Cir.1966). The employer may rebut that presumption, so as to lawfully withdraw recognition of the Union, if it can demonstrate either (1) that the Union actually lost its majority support or (2) that the employer had a good faith doubt based on objective consideration of the continued existence of majority support for the Union. *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1336 (5th Cir.1971), *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972); *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir.1982).

A good faith doubt of the Union's majority status is a defense to a refusal-to-bargain charge based on the withdrawal of recognition. The employer's good faith doubt must be reasonably grounded and supported by objective considerations and "may not depend solely upon unfounded speculation or a subjective state of mind." *Gulfmont Hotel*, 362 F.2d at 589; *see Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir.1981). This is essentially an objective test, although "subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." [5] *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir.1978) (quoting *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir.1975)). Under this standard, the employer need not conclusively demonstrate that a majority of its employees no longer desire to be represented by the Union. *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978).

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[5] The relevant date to look to in determining the bona fides of the employer's doubts is the date that recognition is withdrawn. *Pennco, Inc.*, 684 F.2d at 342.

Determining whether an employer entertains a good faith doubt of a union's majority status is a question of fact. *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999, 1007 (11th Cir. 1987). The burden of proof is on the employer to establish that it had a reasonable, bona fide belief that the Union no longer represented a majority of the bargaining unit employees. *See Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 881 (D.C.Cir. 1973). Once sufficient evidence has been presented to raise a reasonable doubt as to the continued majority status, the rebuttable presumption is overcome and the burden shifts to the counsel for the Board "to prove that on the critical date, the Union in fact represented a majority of the employees." *Landmark Intern Trucks, Inc. v. NLRB*, 699 F.2d 815 (6th Cir.1983) (quoting *Lodge 1764 and 8743, IAM v. NLRB*, 416 F.2d 809, 812 (D.C.Cir.1969)).

B. Summary of Objective Evidence

The Company asserts that its doubt was arrived at in good faith, based on the following factors: the hiring of permanent replacements; returning strikers crossing the picket line; violence and threats associated with the strike; resignations from the Union and withdrawals of dues deduction authorizations; breakdown in Union leadership; Union inactivity and lack of communication with the Company; employee dissatisfaction and disillusionment with the Union; and, finally, the composition of the bargaining unit on April 9, 1986. A summary of the Company's evidence supporting its good faith doubt as to the Union's majority status is outlined below.

(1) *Replacement of strikers.* Shortly after the strike was called on November 11, 1985, the Company began hiring replacement workers for the strikers. On November 12, the Company placed an advertisement in a local newspaper seeking new employees to replace those who had gone out on strike. Between November 13 and 15,

the Company had hired 85 new employees as replacements for the strikers. During the first ten days of the strike, a total of approximately 150 new workers were hired. By the end of December 1983, Bickerstaff had hired 193 new employees and the Company was again fully staffed. According to the Company's records, a total of 227 replacements had been hired when Bickerstaff withdrew recognition. The record shows that 93 of these replacements were actually working at the close of business on April 4, 1986. Twice during negotiations following the strike, Bickerstaff refused to agree to discharge replacements as proposed by the mediator on behalf of the Union.

(2) *Returning strikers.* Out of approximately 300 bargaining unit employees, 195 initially participated in the strike. The Union representative conceded at the hearing that: "On or about December 12th or 13th, [1985], a majority of the striking employees abandoned the strike to return to work." By mid-January 1986, 101 strikers had crossed the picket line and had returned to work. On the critical date the Company withdrew recognition of the Union, at least 147 former striking employees had abandoned the strike and returned to work. The record shows that 133 of the original strikers were employed by the Company at the close of business on April 4, 1986.

(3) *Violence and threats associated with the strike.* At the commencement of the strike, there were a number of incidents of violence associated with the strike. The record shows that these incidents included damage to property, ranging from a shotgun blast into the home of an employee to slashed tires, and personal threats against employees who crossed the picket line. As a result of these incidents of violence, Bickerstaff filed a complaint in state court on November 14, 1986 seeking injunctive relief against the Union and its officers to prevent recurrence of the threats and acts of violence. On November 15, the Circuit Court of Russell County, Alabama

granted the injunction, restraining the Union and "its members, agents, [and] representatives" from committing acts of violence, threats, injuries, or damage to property. There were no incidents of violence reported after entry of the injunction on November 15.

(4) *Written resignations and dues check-off.* After the commencement of the strike, fifteen former union members tendered written resignations from the Union. The record shows that the Company received twenty-three withdrawals of dues deduction authorizations in addition to the written resignations. Therefore, a total of thirty-eight employees either resigned or withdrew from union dues deductions after the strike began on November 11, 1986.

(5) *Breakdown in union leadership.* Shortly after the strike started, the union experienced internal difficulties involving the resignation of its business manager. On December 12, 1985, Union Business Manager Tommy Williams officially resigned his position. After Mr. Williams' resignation, there was no effort to employ another business agent for Local 246 although a succession of four representatives of the International and the District Council of the Union attempted to function as business agent. On January 3, 1986, the International Union parent labor organization placed the Union under trusteeship and dismissed the Union's elected officials. On the following day, January 4, the District Council assumed control of the Union.

(6) *Union inactivity.* The last meeting between the Union and Bickerstaff occurred on January 13, 1986. On January 23, 1986, Bickerstaff declared an impasse and implemented its final offer. The Union did not respond and Bickerstaff received no further communication from the Union until the Union's letter of April 8, 1986, three months later, by which it offered to enter into a collective-bargaining agreement.

The Company submits that a diminishing number of pickets also indicated the lack of union activity and support for the strike. From a high of 39 pickets and picket lines at three separate locations during the week of November 24, 1985, the number of pickets diminished to 20 by the end of January and, finally, to 8 by mid-March. No pickets were seen by the Company after March 30, 1986.

Prior to the strike, the Company asserts that the Union had been active in pursuing grievances and arbitrations for Bickerstaff employees. After the strike, however, the Union never represented any of the members who filed grievances against the Company. A request for arbitration on a matter pending before the strike was never pursued by the Union. Prior to the Company's withdrawal of union recognition, there were four unfair labor practice charges filed against Bickerstaff.[6] The first three, which were filed during the month of November 1985, were filed by the Union itself. The fourth charge was filed on March 24, 1986, however, it was filed by an individual party without union support or participation.

(7) *Employee dissatisfaction and disillusionment with the Union.* On March 6, 1986, an unfair labor practice charge was filed against the Union by three of Bickerstaff's employees. The charge alleged that the Union failed in its duty to fairly represent Bickerstaff's employees. A letter from the Regional Director of the Board on March 20, 1986, a copy of which was sent to Bickerstaff, set out the following investigative findings:

> Although some of the members of the Local, including some of the Local Union officials, were dissatisfied with the representation provided them by the International Union after the resignation of the business manager, there was no evidence which would

[6] Two of these charges were dismissed by the Board and two were voluntarily withdrawn.

> establish that the International Union's conduct was based on any arbitrary or discriminatory considerations. In addition, even though some of the members of the Local have alleged that representatives of the International Union and the business manager of the Local promised to pay benefits to employees participating in the strike against Bickerstaff Clay Products, the Union's refusal to pay those benefits would not constitute an unfair labor practice.[7]

The Company asserts that the Board's own investigation into the unfair labor charge filed by three of the Union's members verified two factors which were significant in Bickerstaff's decision to withdraw recognition: (1) that members of the Local were dissatisfied with leadership provided by the Union; and (2) that the Union reneged upon promised strike benefits.

(8) *Composition of bargaining unit on April 9, 1986.* When the Company withdrew recognition on April 9, the record shows that 304 employees were working in the bargaining unit. The ALJ noted that by the critical date, at least 147 former strikers had returned to work and a total of 227 replacements had been hired. The ALJ stated that the record did not show what portion of the 304 employees working on April 9, 1986 was made up

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[7] During the strike, the local newspapers carried stories about a strike fund that had been promised to be activated for the benefit of the strikers. However, strikers who returned to work for Bickerstaff expressed disillusionment and dissatisfaction with the Union because such promises never materialized. The Union representative who testified at the hearing acknowledged that he heard certain of the strikers make the following statement which was reported in a local newspaper story concerning the strike:

> Strikers who filed the NLRB charge against the Union said that they are still angry the Union reneged on a promise to set up a strike fund for Local 246. They predict that if Laborers International tries to maintain Local 246, it will find the biggest brick wall at Bickerstaff is between the Union and its estranged members.

of replacements, returning strikers, or employees that did not engage in the strike. However, the Board found that the record shows that on April 4, 1986 there were 304 employees at work, of whom 93 had been hired to replace strikers; 133 were strikers who had crossed the picket lines and returned to work; and 78 were employees who had not struck.

C. Discussion

The decision of *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), controlling in this circuit,[8] establishes the standards by which the lawfulness of Bickerstaff's withdrawal of recognition of the Union is to be measured. As in the instant case, the Board decided in *Randle-Eastern* that the employer did not prove it had the required objective evidence to support a reasonable doubt as to the Union's majority status. The Court of Appeals disagreed and reversed the Board's decision. In *Randle-Eastern*, the Fifth Circuit found that three main factors existed which, considered collectively, afforded the Company with an objective basis to doubt the Union's majority status:

> First, 46 [of 166] of the original strikers had returned to work . . . In discounting the value of this evidence, the Board relied on the principle that an employee's return to work during a strike does not by itself provide a reasonable basis for presuming he has repudiated the Union as his bargaining representative. [Citations omitted]. But other factors present here gave the Company a reasonable basis for believing that a good number of the returning strikers no longer supported the Union. The Company had received copies of Union resignation letters

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[8] The decisions of the United States Court of Appeals for the Fifth Circuit prior to September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

from 19 returning strikers and had received information that other reinstatements had also resigned from the Union. Although nonmembership alone does not necessarily indicate nonsupport [citation omitted], resignation after crossing the picket line in a fairly acrimonious strike does.

Second, the Company had hired 47 permanent replacements, of whom six had indicated disinterest in the Union or had been the victims of picket line violence. In the proceedings below, the Board rejected this as evidence of loss of Union support in the workforce, relying on the presumption that new employees "support the Union in the same ratio as those they have replaced." This presumption is usually applied when the employer has experienced high turnover and is trying to escape his bargaining obligations by citing that turnover as his "objective evidence." [Citation omitted]. In our view, however, the presumption does not apply where the "turnover" results from replacement of strikers. *See* R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Uinon and that he ought not be counted toward a Union majority." This is especially true where, as here, the Union is asserting at the bargaining table that the replacements will have to be discharged in order to make room for returning strikers. [Citation omitted].

Third, the Company had been informed by a Union representative that "50 to 25 or 20%" of the strikers would not be returning to work.

Id. at 728.

It is true that an employee's return to work during a strike does not by itself provide a reasonable basis for

presuming that he has repudiated the Union as a bargaining representative. *Allied Indus. Workers, Local Union No. 289 v. NLRB*, 476 F.2d 868, 881 (D.C.Cir. 1973). Absent supporting evidence, it may mean no more than that an employee was forced to work for economic reasons, or that he did not approve of the strike in question but still desires union representation. *Id.; see, e.g., NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir.1970). But other factors, such as employee resignations and dues deduction withdrawals, may be considered by the Company in determining whether there is an objective basis for believing that a substantial number of returning strikers no longer desired union representation.[9]

In this case, the ALJ and the Board, by adopting his decision, stated that the "38 dues deduction withdrawals do not evidence withdrawal of support and the 15 resignations do not constitute a substantial withdrawal." We note, however, that the Company's evidence surpasses the evidence presented by the employer in *Randle-Eastern*. In that case, the court accepted as evidence indicating the loss of union support the fact that eleven percent (11%) of the employees resigned from the Union after the strike. Here, the Company presented evidence that 38 employees, or thirteen percent (13%) of the bargaining unit, either withdrew from dues check-offs or resigned from the Union.[10]

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[9] The decline in the number of employees participating in a check-off program is recognized as an objective factor upon which a good faith doubt can be based. *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546-47 (7th Cir. 1970); *Thomas Indus. Inc., v. NLRB*, 687 F.2d 863 (6th Cir. 1982). "A rapid or a large decline in the number of check-offs may be indicative of loss of support." *Thomas*, 687 F.2d at 868. In *Thomas*, the key factor was "not the percentage of employees on check-offs but rather the rapid decline in check-offs." *Id.* The "rapid" period in *Thomas* was ten months, whereas the Union received all of its withdrawals in this case within a four-month period.

[10] We note that because Bickerstaff did not deduct union dues after the expiration of the contract and the commencement of the

As the court in *Randle-Eastern* recognized, "[a]lthough nonmembership alone does not necessarily indicate nonsupport [citation omitted], resignation after crossing the picket line in a fairly acrimonious strike does." *Id.*, 584 F.2d at 728. In *Randle-Eastern*, there was no description of any specific violence. No returning strikers encountered violence and only a few replacements did. In this case, the ALJ rejected Bickerstaff's evidence because it claims "there was no showing that a substantial number" of those working on the critical date encountered threats or violence.

By adopting the ALJ's findings and conclusions, the Board's position seems to be that the Company could not base its doubt on this set of circumstances because Bickerstaff was able to suppress actual picket line violence with a state court injunction and because Bickerstaff did not specifically identify its workforce members on April 9, 1986 who had been subject to the violence. It should be emphasized, however, that there is no requirement that returning strikers or replacements have crossed the picket line in the face of violence. *See, e.g., Randle-Eastern*, 584 F.2d 720; *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir.1979). Regardless, we note that the record is replete with numerous incidents of violence during the first week of the strike. Once a pervasive atmosphere of violence is established in a strike situation, that atmosphere does not vanish as soon as the violence ceases. We conclude that the substantial number of resignations and dues check-off authorizations in the circumstances of this case may be properly taken into consideration when assessing union majority, although that fact, if standing alone, could not justify withdrawal of recognition.

Although mere high employee turnover is not normally a sufficient ground to negate a union's presumed majority

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strike, the Company employees did not have an incentive to withdraw from dues check-off.

status, the permanent replacement of striking employees presents a different situation. *Soule Glass*, 652 F.2d at 1110. Until recently, the Board consistently relied on the presumption that striker replacements support the union in the same ratio as the striking employees whom they replace. *See, e.g., Cutten Supermarkets*, 220 NLRB No. 507 (1975); *Pennco, Inc.*, 250 NLRB 716 (1980). The Board's position, however, has been strongly criticized as unrealistic and uniformly rejected by reviewing courts of appeals. The Eighth Circuit's rejection of the presumption of strike replacement support for the Union in *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir.1979), was couched in particularly strong terms:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the . . . new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

Id. at 1206. Most recently, the Ninth Circuit noted that the presumption has never been embraced by any court, and affirmed an administrative law judge's conclusion that under the facts of that case, where the union demanded that the employer reinstate all of the strikers as a condition of any collective-bargaining agreement, it was unrealistic to presume that the strike replacements supported the Union. *Whisper-Soft Mills v. NLRB*, 754 F.2d 1381, 1387-88 (9th Cir.1984).

These two circuits, as well as the First and Fifth Circuits, appear to presume that striker replacements do not support the certified union, and refuse to enforce NLRB decisions grounded on the Board's contrary assumptions. *See Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir.1981); *Randle-Eastern Ambulance*

Service, Inc., 584 F.2d 720 (5th Cir.1978); *see also Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir.1988). These circuits seem to rely heavily on the statement made by one commentator, R. Gorman, Labor Law (1970), that "if a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not be counted toward a Union majority." *Id.* at 112.[11]

In *Randle-Eastern*, our predecessor circuit considered the presumption that new employees support the Union in the same ratio as those they have replaced, and rejected its application where the employee "turnover" results from the replacement of strikers. *Id.*, 584 F.2d at 728. In rejecting the Board's presumption, the court approvingly cited Gorman's view that striker replacements be deemed not to support the union. Recently, in *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir.1988), the Fifth Circuit reaffirmed that *Randle-Eastern* establishes the framework for evaluating a company's withdrawal of recognition of a union. In *Curtin Matheson*, the court reversed the Board's finding that the Company violated the NLRA by withdrawing recognition of the Union. In its decision, the court expressly reaffirmed the Gorman presumption, stating that it was "especially true" where the striker replacements were

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[11] *See Pennco, Inc. v. NLRB*, 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982) (denial of writ of employer's petition for certiorari in *Pennco v. NLRB*, 684 F.2d 340 (6th Cir. 1982)). Justice White, joined by Justices Blackmun and Rehnquist, expressed the opinion that the Court should grant certiorari to address the conflict between the Board and the apparent acceptance of the Gorman presumption by four circuits. Justice White noted that Professor Gorman's original statement was supported only by a single citation to *Titan Metal Manufacturing, Co.*, 135 NLRB 196 (1962), a case that has neither been cited by the Board for the proposition Gorman states nor been expressly overruled. 459 U.S. at 995, 103 S.Ct. at 355.

the victims of picket line violence, and the Union was bargaining for the discharge of the striker replacements to make room for returning strikers.[12] *Id.* at 367 (citing *Randle-Eastern*, 584 F.2d at 728).

On the other hand, the Second and Sixth Circuits refused to countenance any presumption concerning striker-replacements. In *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 812-13 (2d Cir.1978), the court avoided the question of the validity of the Board's approach but rejected the presumption that "no replacement employee supports the Union," describing it as "equally, if not more assailable than the NLRB's [presumption]." *Id.* at 813. The Sixth Circuit likewise "expressly decline[d] to adopt either presumption" in *NLRB v. Pennco, Inc.*, 684, F.2d 340, 342-43 (6th Cir.), *cert. denied*, 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982). The Court held the employer's withdrawal of recognition unlawful because the employer simply did not establish any objective basis, aside from an invalid presumption, for believing that the certified union was not the choice of the majority. The court found that given the facts of the case, the evidence was sufficient "only to put the parties in equipoise." 689 F.2d at 393. The court concluded that the employer "would need some further evidence of union non-support in order to shift the burden to the Board to prove the union in fact had a majority status on the critical day." *Id.*

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[12] In *Curtin Matheson*, the record contained no evidence of picket line or other strike-related violence or threats during the course of the strike. Although there was no picket line violence or negotiating to discharge the striker replacements, the court held that the Company was justified in doubting that the striker replacements supported the Union where a substantial majority of the bargaining unit employees are replaced in a very short period, and where the striker replacements cross a picket line, violent or not, to report to work each day. *Id.* (citing *National Car Rental Systems, Inc. v. NLRB*, 594 F.2d 1203 (8th Cir. 1979)).

Recently, in *Buckley Broadcasting of Calif., Inc. d/b/a Station KKHI*, 284 NLRB No. 113 (1987) ("*Station KKHI*"), the Board addressed the recurring question in withdrawal of recognition cases of whether presumptively to count striker replacements for or against the Union. In *Station KKHI*, the Board departed from its earlier embrace of a presumption that striker replacements support an incumbent union. The Board acknowledged that "there was no articulated basis in reason or policy" for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, but also declined to adopt a countervailing presumption that replacements oppose the Union. The Board concluded that too many variables are present in a strike situation to confidently advance any generalization about the motives of strike replacements. Instead, the Board adopted a neutral, fact dependent approach derived from the Sixth Circuit in *Pennco, Inc.* The Board's ad hoc approach, then, is to consider the union sentiments of striker replacements on an all-of-the-circumstances basis, requiring "some further evidence of union non-support" of the employees who are hired as replacements for strikers in order to establish a good faith doubt. *Station KKHI*, 284 NLRB 113 (quoting *Pennco*, 684 F.2d at 343).

The *Curtin Matheson* court raised the question of whether the Board's position in *Station KKHI* establishes a "new" standard for characterizing strike replacements in withdrawal of recognition cases. The *Curtin Matheson* court rejected the Board's contention that *Station KKHI* established a new standard because

> [o]perationally the *Station KKHI* standard has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace. . . . Under either standard, the Company is required to have objective evidence regarding the striker replacements' non-support in

> order to count them as employees whom the Company doubts support the Union.

Id. at 367.

It is true, as the *Curtin Matheson* court notes, that under both the Board's prior presumption of union support among replacement workers and its current neutral position under *Station KKHI*, an employer must come forward with some objective evidence regarding the replacement worker's failure to support the union. This does not mean, however, that the two standards are the same. The difference is the nature and amount of evidence required. Simply stated, the new Board position gives more flexibility to consider each situation on its own facts. *See Curtin Matheson*, 859 F.2d at 370 (Williams, J., dissenting).

The question is presented whether the Board's position established in *Station KKH!* can be reconciled with the decision of the former Fifth Circuit in *Randle-Eastern*. The holding of *Randle-Eastern* is that the presumption that new workers support the union in the same ratio as the employees they have replaced "does not apply where the 'turnover' results from the replacement of strikers." 584 F.2d at 728. While the court did approvingly cite to Professor Gorman's treatise, its decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of the striker replacements to make room for the strikers. The existence of picket line violence with respect to striker replacements was also a factor which strengthened the Company's doubt that those employees support the Union.

We decline to read *Randle-Eastern* so broadly as to establish an unqualified rule applicable in every strike situation where replacement workers are hired. The decision in *Randle-Eastern* should be limited to the spe-

cific facts of the case.[13] Read more narrowly, *Randle-Eastern* does not conflict with the Board's *Station KKHI* ad hoc approach since the evidence presented by the employer in *Randle-Eastern* is sufficient to satisfy the requirement of *Station KKHI* that the Company present "some further evidence of union non-support" in order to count replacements as employees whom the company doubts support the Union. *See Pennco*, 684 F.2d at 343.

In this case, the Company expressly rejected proposals made by the mediator on behalf of the Union that Bickerstaff's strike replacements be discharged so that striking employees could return to work.[14] Moreover, as previously noted, the strike replacements had to cross a picket line, at least for a time, in an atmosphere of violence. Common sense dictates that it is highly unlikely that a replacement worker supports the union if the

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[13] We decline to speculate as to what other factors, if any, may be sufficient to constitute "some further evidence of union non-support." *See Pennco*, 684 F.2d at 343. The *Randle-Eastern* decision is analogous in this respect to *Whisper-Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir. 1984). After expressly rejecting the presumption that striker replacements support the union in the same ratio as strikers, the court concluded that the ALJ was correct in determining that the replacement workers did not support the Union under the "unique circumstances" of the case: the Union was demanding discharge of a majority of the replacement workers. 754 F.2d at 1388. In *Whisper-Soft*, there was no violence, no rejection of union leadership, no resignation, and no union dormancy.

[14] The Board submits that the mediator rather than the union in this case made the inquiries as to whether the Company could take back the striking employees in preference to the replacements. The Board argues that this inquiry "hardly matches the evidence in *Randle-Eastern*" of union demands. We note in *Randle-Eastern*, as in this case, the facts show active participation by the mediator on behalf of the Union for the preference of returning strikers over replacements. Moreover, the Board's characterization of union demands are overstated. The facts in *Randle-Eastern* show that the Union, after taking its initial position that returning strikers be given priority over the replacements, stated that it would be "flexible" on the replacement versus returning strikers issue. 584

union is negotiating for his discharge and he crosses a union-sponsored picket line, violence or not, to report to work each day. Under the facts of this case, we conclude that the Company was justified in counting the striker replacements as employees whom the Company doubts supports the Union.

A comparison between the bargaining unit in *Randle-Eastern* and the bargaining unit in this case is instructive for purposes of applying the *Randle-Eastern* criterion[15] The comparison illustrates that the Bickerstaff

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F.2d at 724. In both cases, the Union was negotiating against the interests of the replacements.

[15] SUMMARY OF THE BARGAINING UNIT ON WITHDRAWAL OF RECOGNITION

	Randle-Eastern	Bickerstaff
1. Number of employees in the unit on the date of strike	177	304
2. Number of employees participating in the strike	166(94%)	195(64%)
3. Number of strikers who had returned to work on the date of non-recognition	46(26%)	133(44%)
4. Number of employees who resigned or withdrew from dues authorizations after the strike	19(11%)	38(13%)
5. Number of permanent striker replacements working on date of non-recognition	47(27%)	93(31%)

We note that since striking employees retain their employee status under section 2(3) of the Act, 29 U.S.C. Sec. 152(3), the bargaining unit for purposes of determining the union's majority status in a case where the employer has hired striker replacements consists of the total number of strikers *and* strike replacements at the time of withdrawal of recognition. *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 986-87 (5th Cir.), *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970); *NLRB v. Winham Community Memorial Hospital*, 577 F.2d 805, 813 (2d Cir. 1978). In the instant case, the Board submits that there were 50 employees still

percentages in all the relevant categories exceeded those found in *Randle-Eastern;* strike participation (Bickerstaff had a lower percentage of its employees to go out on strike than *Randle-Eastern*) ; returning strikers (Bickerstaff had a higher percentage of strikers to return to work than *Randle-Eastern*) ; resignations or check-off withdrawals (Bickerstaff had a higher percentage of employees who either resigned or withdrew from dues check-off authorizations than *Randle-Eastern*) ; and striker replacements (Bickerstaff had a higher percentage of striker replacements than *Randle-Eastern*).

The only other factor present in *Randle-Eastern* which is not present in this case was the union's statement that twenty percent of the strikers would not be returning to work.[16] 584 F.2d at 727. On the basis of these factors, the *Randle-Eastern* court recognized the existence of a good faith doubt of union support. In this case, there are a number of other factors in the record which support the Company's good faith doubt of majority status which were not present in *Randle-Eastern.* These factors

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on strike at the time the company withdrew recognition which should be included in the bargaining unit of 304 employees, resulting in a total of 354 unit members. The Company contends that the record shows a number of strikers who should not be included in the total bargaining unit because they either obtained permanent employment elsewhere or did not want to return to work. According to the Union's position, the Company was required to have a good faith belief that at least 177 of the unit employees did not desire union representation.

[16] The Company did rely on a statement of a union organizer, which was quoted in a local newspaper in January 1986, indicating that most of the strikers "would never go back to work" for Bickerstaff unless they received a favorable settlement of the strike. The company contends that since the Union's demands were so unreasonable, this statement was tantamount to saying that those strikers had no intention of returning. We note that this "subjective evidence may be used to bolster the argument that such doubt existed." *See NLRB v. Windham Community Memorial Hospital,* 577 F.2d 805, 811 (2d Cir. 1978).

include the breakdown in union leadership, union dormancy, and employee dissatisfaction and disillusionment with the Union.

The Board relies on *Pepsi Cola Bottling Co., etc. v. NLRB*, 659 F.2d 87 (8th Cir. 1981) for the proposition that an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn. *Id.* at 90. The Board concluded that the Company "did not withdraw its final offer before acceptance and the evidence reveals no 'circumstances . . . which would lead the parties to reasonably believe that the offer had been withdrawn.'" This conclusion, however, ignores the change in circumstances which had occurred by the time the Company withdrew recognition. After the meeting between the Union and the Company on January 13, 1986, Bickerstaff received no further communication from anyone on behalf of the Union with regard to contract negotiations, grievances, the strike or any other matter, until the Union's letter of April 8, 1986, by which it offered to enter into a collective-bargaining agreement. During this period of time, the Union was totally inactive. There was no documented participation by bargaining unit members in any union-sponsored activities after January of 1986. The only grievance filed against the Company during this time period was filed by an individual without union support or participation. The business agent had resigned nearly four months prior to withdrawal of recognition. No new business agent for the Local had been appointed and the Local's elected officials were removed from office. An unfair labor practice charge was filed against the Union by three of Bickerstaff's employees on March 6, 1986, alleging a failure by the Union to fairly represent its members as the bargaining representative. The Board's own investigation into this charge verified that some members of the Local were dissatisfied with the Union representation, which stemmed

in part from the failure to pay strike benefits as promised by the Union. The evidence in the record shows that the Union had effectively abandoned its role as the representative of the unit employees by the time the Company withdrew recognition.

There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status.[17] If the circumstances changed such that the Company reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union.

The Board has rejected a composite showing of objective evidence which is sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt as to the representative status of the Union. Unlike many other cases in which the circuit courts have upheld the Board's determination that the employer did not have a reasonable basis for doubting the Union's majority status, we conclude that Bickerstaff's doubt

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[17] The events leading to the withdrawal of recognition in this case are essentially identical to those found in *Curtin Matheson*, 859 F.2d at 364. In *Curtin Matheson*, the Company made a final offer which was rejected twice by the Union. While the strike was in progress, the Company put into effect the wage schedule proposed in its final offer. Within a month, the Union ended the strike, offered unconditionally to have the striking employees return to work, and informed the Company that it was accepting its final offer. Thereafter, the Company notified the Union that the final offer was not available, and because it had doubts as to the Union's majority status, that the Company was withdrawing recognition and refusing to bargain further. In *Curtin Matheson*, as in this case, there was no formal withdrawal of the final offer before the withdrawal of recognition based on a good faith doubt of majority status.

> was not based solely upon "speculative and subjective" evidence [citation omitted], dependent upon "isolated reports" from "vague and unidentified sources" [citation omitted], or predicated upon the President's "feeling" that the Union had lost majority support [citation omitted]. Rather, the Company made permissible inferences from solid evidence . . . which in our view were sufficient to support a reasonable doubt of the Union's continued majority status.

Randle-Eastern, 584 F.2d at 729. Consequently, we are unable to conclude that substantial evidence on the record as a whole supports the Board's conclusion that the Company unlawfully withdrew recognition.

In determining whether an employer has sufficient objective evidence of loss of union support to justify withdrawal from bargaining, the cumulative effect of *all* of the evidence must be considered. *Thomas*, 687 F.2d at 868. Generally, several indicia of loss of majority support are required and no one factor is determinative, i.e., striker replacements or union dormancy. *Soule Glass*, 652 F.2d at 110. We acknowledge that the above factors do not translate readily into a "precise numerical estimate" of the Union's strength, but this is not fatal to the Company's case. *Randle-Eastern*, 584 F.2d at 729. We emphasize that the Company need not have conclusive proof that the majority of employees do not support the Union, only sufficient "objective evidence to support a good faith doubt of majority status." *Id.* In our view, the Board has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company. The Ninth Circuit, in reversing a Board order finding insufficient evidence in a good faith doubt case, had this criticism of the Board which is applicable to this case:

> The Board concluded that each fact considered separately did not give [the Company] reasonable

> grounds to doubt the union's majority status and that the evidence as a whole was no greater than the sum of its separate parts. . . . The courts require an assessment of the cumulative force of the combination of factors [citations omitted]. Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate.

Golden State Rehabilitation Convalescent Center v. National Labor Relations Board, 566 F.2d 77, 79-80 (9th Cir. 1977).

We therefore reverse the Board's finding that the Company violated Sections 8(a)(1) and (5) by withdrawing recognition of the Union. The court also reverses the Board's findings that the Company violated these sections by refusing and failing to furnish the Union with certain information requested, and refusing to execute a collective-bargaining agreement the Board found was reached on April 8, 1986. Since an employer is only obligated to provide its employees' bargaining representative with information necessary and relevant to fulfill its statutory collective-bargaining function, the Company did not commit an unfair labor practice by refusing to provide the information requested. *See Curtin Matheson*, 859 F.2d at 367. By the same logic, no violation of Sections 8(a)(1) and (5) occurred when the Company refused to execute a contract when the Union attempted to accept the Company's November 6, 1985 offer.

ENFORCEMENT DENIED.

BSC

D—4779
Phenix City, AL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 10—CA—21681

BICKERSTAFF CLAY PRODUCTS, CO., INC.,

and

LABORERS' LOCAL UNION NO. 246

DECISION AND ORDER

On 15 December 1986 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as

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[1] The judge states that the record does not show what portion of the 304 employees working on 9 April 1986 was made up of replacements, returning strikers, or employees that did not engage in the strike. We note, however, that the Respondent's Exh. 29 shows that on 4 April 1986 there were 304 employees at work, of whom 93 were replacements, 133 were strikers who had returned to work, and 78 were employees who had not struck.

[2] In agreeing with the judge that the Respondent has not shown that it had a good-faith doubt based on objective considerations that the Union represented a majority of its employees when it withdrew recognition on 9 April 1986, we find that the total evidence presented by the Respondent is insufficient to rebut the

modified,[3] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bickerstaff Clay Products, Co., Inc., Phenix City, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the folowing as paragraph 2(e) and reletter the subsequent paragraphs accordingly.

"(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necesary to analyze the amounts due under the terms of this Order."

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presumption of the continued majority status that the Union enjoyed as the incumbent bargaining representative. We find it unnecessary to apply any presumption whether the employees who replaced the strikers supported or did not support the Union. See *Station KKHI*, 284 NLRB No. 113 (July 27, 1987). Moreover, in accepting the judge's conclusion that the Respondent has not met its burden of establishing a good-faith doubt, we note that the evidence does not show any linkage between the changes that took place in the Union's leadership and any employee dissatisfaction with the Union.

[3] We add to the remedy section of the judge's decision the provision that interest on any monetary award be computed in accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987). Interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Dated, Washington, D.C. 30 September 1987

MARSHALL B. BABSON, Member

JAMES M. STEPHENS, Member

MARY MILLER CRACRAFT, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD(ATL)—81—86
Phenix City, AL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Case 10-CA-21681

BICKERSTAFF CLAY PRODUCTS, CO., INC.

and

LABORERS' LOCAL UNION NO. 246

Richard Y. Bradley, Counsel for Respondent.

Mary L. Bulls, Counsel for General Counsel.

DECISION

Statement of the Case

J. Pargen Robertson, Administrative Law Judge. This case was heard in Columbus, Georgia, on 16 July 1986. The complaint alleged that Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from Laborers' Local Union No. 246 on 9 April 1986; by refusing to sign a collective-bargaining agreement with the Union; and by refusing to provide the Union with requested information regarding bargaining unit employees from 9 April 1986. In its answer Respondent denied that it is an Alabama corporation as alleged in the complaint. However, Respondent admitted that it is engaged in the manufacture and sale of brick and concrete products at its Phenix City, Alabama, operations

and that it meets the Board's commerce standards and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Although Respondent answered that it has insufficient information to respond to the allegation that the Union is a labor organization, the entire record showed that Respondent and the Union have negotiated various collective-bargaining agreements regarding wages, hours, and other conditions of employment for employees of Respondent on regular occasions since 1965. Respondent and the Union last met for the purpose of negotiating a contract on 13 January 1986. Subsequently, as shown below the Union offered to accept a collective-bargaining agreement proposal of Respondent on 8 April 1986. In view of that evidence I find that the Union is, and has been at all times material herein, a labor organization engaged in commerce within the meaning of Section 2(5) of the Act.

General Counsel also alleged that Respondent has violated Section 8(a)(1) and (3) of the Act since 8 April 1986, by refusing to reinstate employees that engaged in a strike. However, by motion included in her brief, Counsel for General Counsel moved to withdraw complaint paragraphs 17 and 19 which alleged that Respondent has refused to reinstate striking employees. Counsel for General Counsel asserted in that motion that the evidence presented by Respondent during the hearing herein, "established that it had hired permanent replacements to fill the positions of striking employees; . . . and striking employees who sought reinstatement are being reinstated as openings occur." In view of the record, I grant General Counsel's motion to withdraw paragraphs 17 and 19 of the complaint.

Since 1965 the Union, Laborers' Local No. 246, has represented certain of Respondent's employees. At that time the Union was certified as the exclusive bargaining representative for employees in one of Respondent's three

plants. Subsequently, in 1966, Respondent voluntarily recognized the Union as the exclusive representative for all employees in the below described unit, after Respondent consolidated its operations into a single corporate entity:

> All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

Respondent and the Union negotiated several collective-bargaining agreements and their most recent agreement expired on 31 October 1985. On 29 August 1985 the Union advised Respondent of its plan to negotiate changes in the existing collective-bargaining agreement. Respondent and the Union met, and negotiated on several occasions beginning on 17 September 1985.

Respondent made a "final offer," on 6 November 1985. On 11 November 1985, the Union struck. Out of the bargaining unit of 304 employees, 195 employees originally participated in the strike against Respondent. Respondent did not cease operations. One hundred and nine unit employees did not engage in the strike, and Respondent immediately began hiring permanent replacements for the striking employees.

On 20 January 1986, those unit employees actually working totalled 300. Respondent offered evidence that before 20 January and continuing thereafter, it was at "full strength" of bargaining unit employees.

On 23 January 1986, Respondent advised the Union that negotiations were at an impasse and that it was instituting increased "wages and other benefits for those

working in the plants in accordance with the company's final proposal which was made on November 6, 1985."

By 8 April 1986 letter, the Union advised Respondent that it accepted "the final offer made by the company on November 6, 1985." In that letter the Union asked for a listing of all employees currently working along with various matters regarding each working employee.

On 9 April 1986, Respondent wrote the Union:

> This will acknowledge receipt of your letter of April 8, 1986 regarding your union and Bickerstaff Clay Products Company, Inc.
>
> Based upon facts and circumstances which have occurred since the strike at our client's plant, we seriously doubt that your union represents a majority of our employees. Under these circumstances we do not believe that we can recognize your union as the bargaining agent for our employees. Therefore, our last offer is no longer outstading to your union and your offer to sign a collective bargaining agreement with our client is declined. Furthermore, your request for information about our employees is refused.

On 9 April 1986, at least 147 former striking employees had abandoned the strike and returned to work with Respondent.[1]

At the hearing,, Respondent's chief executive officer responded to questions regarding matters which he considered in determining to withdraw recognition from the Union. That testimony, which is paraphrased below, included:

> (1) To the question did the significant number of replacements of former strikers that came back to work in spite of "the violence," indicate whether the

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[1] Respondent's records show that 147 former strikers had returned by the period ended on 6 April 1986. The next reporting period ended on 13 April. As of that date 149 former strikers had returned to work.

employees desired to have the union continue to represent them, Richard Bickerstaff, replied that that factor indicated to him that the employees had no interest in the Union representing them and it further indicated to him that the people that had gone on strike were beginning to feel that they had been totally mislead, intimidated, and harrassed.

(2) To the question what part if any, did the receipt by Respondent of some 38 "written resignations either from membership or from the checkoff" have to do with your decision to withdraw recognition, Bickerstaff replied that was an indication that some of the employees had taken close enough notice of the situation to actually resign in writing. However, he went on to say that the other employees "didn't see the need to turn in a resignation," in view of the fact that there was no dues checkoff and the employees "all felt that they were out of the union because they were working."

(3) To the question whether the fact that the Union did not involve itself in grievances on behalf of employees after the strike commenced have any significance in the determination to withdraw recognition, Richard Bickerstaff responded that he assumed that the union had "abandoned." Richard Bickerstaff also testified that his daily routine carried him past the union hall on his way home, and that he noticed a drop off in activity around the hall from the time the strike began until he decided to withdraw recognition.

(4) Richard Bickerstaff testified that some of the returning employees expressed disillusionment and dissatisfaction with the Union because, to his knowledge, no strike funds were made available to striking employees.

(5) Bickerstaff testified that he was also impressed with his understanding that under the circumstances

similar to those existing with Respondent at the time he withdrew recognition, another local of the national union had abandoned a bargaining unit at a nearby employer in the same industry as Respondent.

(6) In response to his attorney's questions, Bickerstaff testified that he was also influenced in determining to withdraw recognition, by local newspaper articles indicating that one of the striking employees had said that he and most of the others on strike would never go back to work for Bickerstaff unless the employees won a favorable settlement. That newspaper article was dated 8 January 1986.

(7) In making his decision to withdraw recognition Bickerstaff testified that he was also influenced by the fact that an NLRB unfair labor practice charge against Respondent in March 1986 was filed by an individual rather than the Union, and by the fact that on 6 March 1986, an unfair labor practice charge was filed against the Union alleging that the Union had failed in its duty to fairly represent Bickerstaff employees.

(8) Bickerstaff testified that he was also influenced in determining to withdraw recognition by the fact that the number of pickets at Respondent's facilities dropped off considerably from the time near the beginning of the strike until the period shortly before he withdrew recognition. In that regard Respondent offered evidence showing that the total number of pickets at Respondents's facilities fluctuated between 14 and 39 until 22 December 1985. Subsequently, during March 1986, the total number of pickets did not exceed eight and during the week ending 30 March 1986 there were only two employees picketing Respondent's facilities. Since 30 March 1986 there have been no pickets at Respondent's facilities.

Conclusions

Section 7 of the National Labor Relations Act provides to employees the exclusive right "to bargain collectively through representatives of their own choosing" or "to refrain from any and all such activities . . ." In view of those provisions it is important to exercise caution where, as here, the determination as to representation or lack of representation is made by an employer. *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 137, 138 (1982).

Both the Board and the Courts have historically proceeded cautiously in cases of this type. In instances where the employer and the Union were parties to one or more collective-bargaining agreements it is presumed that the Union continued to serve pursuant to the wishes of a majority of the employees in the bargaining unit. *Atlanta Hilton & Towers*, 278 NLRB No. 76 (1986). That presumption continues after the collective-bargaining agreement expires *Carmichael Construction Company*, 258 NLRB 226 (1981), and maybe rebutted by evidence showing either;

> (1) That the Union actually lost its majority support; or
>
> (2) That the employer had a good-faith doubt based on objective considerations of the continued existence of majority support for the Union. *Aqua Slide'N' Dive Corporation*, 281 NLRB No. 34 (1986); *Pennco, Inc.*, 250 NLRB 716 (1980) enfd. 684 F.2d 340 (6th Cir. 1980).

In the instant case the record does not show that the Union actually lost majority support. Instead Respondent argues that it had a good-faith doubt based on objective considerations, that the Union maintained majority support.

As to General Counsel's allegation that the parties reached a collective-bargaining agreement which Re-

spondent refused to sign on 9 April 1986, the record offers support for that complaint allegation. On 6 November 1985, Respondent made a final offer of a new collective-bargaining agreement. On 11 November 1985 the Union struck Respondent's operations. Thereafter, on 23 January 1986 Respondent notified the Union, in part:

> The Company is desirous of increasing wages and other benefits for those working in the plants in accordance with the Company's final proposal which was made on November 6, 1985.
>
> After due consideration, we have concluded that negotiations are and have been at an impasse and accordingly, the Company will put its final proposal into effect as of January 27, 1986.

Subsequently, by 8 April 1986 letter, the Union wrote Respondent as follows:

> This is to inform you that Laborers' Local 246, affiliated with the Laborers' International Union of North America, AFL-CIO, has accepted the final offer made by the Company on November 6, 1985.
>
> It is my understanding that the Company has implemented the terms of that final proposal on January 27, 1986. We will be available to meet and sign the Agreement on Monday, April 21, 1986 if this meets with your schedule. Please contact the undersigned at 404-325-0006 to confirm this date. If you need assistance in preparing the document for signature please contact me.
>
> Additionally, please foward to me a listing of all employees currently working at your Phenix City, Alabama operations. Along with their name, please include the following information: address, phone number, social security number, date of hire, job assignment, rate of pay, marital status, shift, and number of dependants.

> By this letter we are offering an unconditional return to work for all striking employees and request you provide me with a listing of all employees you place on the preferential hiring list.
>
> I look forward to seeing you on the 21st of this month.

On the following day, 9 April 1986, as shown above, Respondent informed the Union that its final offer was no longer outstanding and that it would not sign a collective-bargaining agreement.

On 8 April 1986, Respondent had taken no action to withdraw its contract offer of 6 November. The 8 April letter stated categorically that the Union accepted Respondent's 6 November offer. At that time Respondent had not questioned the Union's majority status.

Respondent's chief operating officer, President Herbert Fuller, testified that in negotiations before 6 November 1985, Respondent and the Union had reached agreement on all but a few points, such as "probationary period, bulletin board use, call in pay . . . (w)e were still drastically apart on the economic issues." Regarding economics Fuller's testimony shows that the parties had failed to agree on wage increases, increased pension and insurance contributions and holidays. Respondent's 6 November "final offer" covered all the outstanding issues mentioned by Fuller and, in combination with the other issues previously agreed to by Respondent and the Union, constituted a complete contract.

On 10 November 1985 Respondent was advised by the local's business agent, that the "Union has voted to reject the offer and to strike effective 6 a.m., Monday morning, November 11."

Before the strike, Respondent and the Union had negotiated with the assistance of a Federal Mediator. After the strike Respondent and the Union met again on 18 November and 9 December and negotiated with the as-

sistance of the Federal Mediator. On 12 December Respondent's chief executive officer, Richard Bickerstaff, met with a representative of the International Union, Paul Chappelear. Finally, Respondent and the Union met and negotiated with the assistance of the Federal Mediator on 13 January 1986.

On 23 January 1986 Respondent notified the Union that in its view negotiations were at an impasse and it was implementing increased "wages and other benefits . . . in accordance with the company's final proposal which was made on November 6, 1985."

Jurisprudence indicates that Respondent's 6 November final offer may have remained outstanding despite original rejection of that offer. In *Pepsi Cola Bottling Co., etc. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981), the court held:

> Under the policy (of the National Labor Relations Board), an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn." (See also the underlying Board Decision, *Pepsi Cola Bottling Co.*, 251 NLRB 187, 189 (1980); *Pennasquitos Gardens, Inc.*, 236 NLRB 994 (1978) enfd. 604 F.2d 225 (9th Cir. 1979); *Shawns Lunch Service*, 261 NLRB 836 (1982).

The facts in *Pepsi Cola*, were similar to those here in that the Union engaged in an economic strike and rejected the company's final offer.

Here Respondent did not withdraw its final offer before acceptance by the Union and the evidence reveals no "circumstances . . . which would lead the parties to reasonably believe that the offer had been withdrawn." In fact, Respondent's 23 January letter expressed its intent to implement the provisions of that offer. Respondent contends that the Union abandoned its role as repre-

sentative of the unit employees. However, that argument must be rejected. Respondent offered evidence showing that it was aware of continued picketing in support of the Union's strike through 30 March 1986, and Respondent was aware of involvement by the International Union. Respondent presented evidence regarding an unfair labor practice charge filed against the Union on 6 March 1986. In his letter dismissing that charge which was sent to the Union and Respondent, the National Labor Relations Board's Regional Director mentioned findings that although the union's local business agent had resigned, the local was placed under trusteeship of the International and the "International Union's Regional Office sent a number of representatives to the local in an effort to assist the local members who were participating in a strike against Bickerstaff Clay Products." Respondent was aware of the International Union's activities. Respondent negotiated with the representatives from the International and it was to those representatives from the International that Respondent sent its 23 January 1986 letter.

Finally, even though Respondent's "final offer" was accepted by the Union's business agent without a supporting vote of the members, the record evidence illustrated that the business agent had constitutional authority to accept Respondent's contract proposal.

I find that from 8 April 1986, Respondent and the Union were parties to a new collective-bargaining agreement as finally proposed by Respondent to the Union on 6 November 1985. [*Cowles Publishing Company*, 280 NLRB 105 (1986).]

Respondent defends the allegation that it also violated Section 8(a)(5) by withdrawing recognition of the Union on 9 April, on the grounds that it had a good-faith doubt of the Union's majority status.

Respondent contends that it was justified in withdrawing recognition because of a presumption that new hires

and former strikers who cross a picket line in an atmosphere of violence, do not support the Union. As of 9 April 1986, 304 employees were actually working in the bargaining unit. However, there was no showing that a substantial number of those employees initially crossed the picket line while there was on-going incidents of violence flowing from the strike.

The record does show incidents of violent activity. However, those incidents occurred at the very beginning of the strike. On 15 November Respondent, with the consent of the Union, secured an injunction prohibiting violence. A newspaper article reported that on 14 November a "shotgun blast was fired into the home of a Bickerstaff Clay Product's Co., employee who had continued to work during the strike. . ." That article which was dated 17 November 1985, reported that shotgun blast was the second shooting incident since the strike and that other incidents including slashed tires, had been reported to police. Subsequently, the same newspaper, the Columbus, Georgia Ledger-Enquirer, published a calendar of events in the "Bickerstaff strike." The only incidents of violence mentioned in that 10 November through April calendar of events were the two shooting incidents mentioned above. The calendar listed those shooting events as occurring 13-14 November. Finally, affidavits filed with the Respondent's 15 November 1985 petition for a Writ of Injunction, included only some of the incidents of violence mentioned above, along with some threats against employees. The 17 November newspayer article reported two cut tires on Monday night—11 November.

All the reported violent activity occurred from the evening of 11 November through the evening of 14 November. There were no incidents of violence after Respondent was granted an injunction on 15 November.

According to Respondent's records 85 replacements were hired before the close of business on 15 November

1985. As shown above, 109 employees did not participate in the strike. On 17 November, which is the first date shown on records in file, four strikers had returned to work.

When Respondent withdrew recognition on 9 April, 304 employees were working in the bargaining unit. At that time at least 147 strikers had returned to work and a total of 227 replacements had been hired. The record does not show what portion of the 304 employees working on 9 April, was made up of replacements, returning strikers, or employees that did not engage in the strike. Nor does it show how many of the employees that were working on 15 November remained at work on 9 April.

In a recent case the Board found that an employer was justified in withdrawing recognition from a Union on the grounds of good-faith doubt as to continued majority status. However, in that case, *Stormor, Inc.*, 268 NLRB 860 (1984), the credited evidence showed that replacements and returning strikers crossed the picket line despite "continued violent strike activity over an extended period—approximately 3½ months" and that "approximately 20 percent of the nonstriking employees, speaking for themselves and in some instances purporting to speak for other nonstrikers" repudiated or rejected the Union.

Here the period of violent activity was brief and the evidence regarding rejection or repudiation was limited to 15 employees who resigned from the Union. Although Richard Bickerstaff testified that "people" indicated "disillusionment and dissatifaction with the Union because the Union failed to provide the promised strike benefits," Bickerstaff was unable to recall the name of any of those people.

The instant case is closely aligned with the facts in *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir. 1982) cert. denied 103 S. S. Ct. 355. There the court enforced a Board order holding that an employer violated Section

8(a)(5) by withdrawing recognition. Although there was picket line violence in *Pennco*, the Board refused to endorse the employer's action where the picket line violence occurred 3½ months before the withdrawal of recognition. Here, the violence occurred almost 5 months before Respondent withdrew recognition (See also the Board's Decision in *Pennco, Inc.*, 215 NLRB 716 (1980).

Respondent argues that it received 38 withdrawals from employees. The record shows that of the 38 withdrawals of dues checkoff deduction authorization, only 15 employees expressed a desire to resign from the Union. Additionally, Richard Bickerstaff testified that employees other than the 38 that submitted dues deduction withdrawals all felt that they were out of the Union.

Respondent offered no objective evidence supporting Bickerstaff's testimony that other employees felt they were out of the Union. His "belief" without some foundation is entitled to no weight. The 38 dues deduction withdrawals do not evidence withdrawal of support, and the 15 resignations do not constitute a substantial withdrawal. (See *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 138 (2nd Cir. 1982)

Respondent's argument that the Union abandoned its representative role does not find support in the record. Even though the contact between the Union and Respondent lapsed between Respondent's 23 January letter and the Union's letter of 8 April, the Board has consistently found that longer periods do not justify a finding that the Union has abandoned its role. *Cowles Publishing Company*, 280 NLRB No. 105, slip op. p. 16 (1986). Here the Union's presence was apparent by its picketing activity through 30 March—some 8 days before the Union accepted Respondent's final contract offer. Bickerstaff's testimony that he did not see sustained activity when he drove by the union hall does not establish absence of union activity. Moreover, even though the union busi-

ness agent resigned in early December 1985, the Union was in trusteeship under direction of the same business agents from before the Union's and Respondent's last negotiating session on 13 January, until after Respondent withdrew recognition. Therefore, the change in business agents does not contribute to a valid good-faith doubt *Cowles Publishing Co., supra.* As in *Cowles Publishing Co.*, the Union's involvement in grievance activity lapsed following the 11 November strike. However, Respondent did not advise the Union of any grievances after 11 November and the one unfair labor practice charge against the Union alleging failure of representation, was dismissed by the Regional Director.

Contrary to Respondent's contention, the record does not show any relationship between the instant circumstances and the fact that another local of the International abandoned its representation duties at another unrelated employer in Central Georgia.

Although picketing activities dropped off until it ceased on 30 March, that action shows only that those employees finally abandoned the strike. That abandonment was admitted by the Union's 8 April letter offering, on behalf of the striking employees, to return to work. That offer also mitigates the affects of newspaper articles pointed to by Richard Bickerstaff indicating that some employees vowed not to return to work until they received a favorable settlement. The letter offered to return to work all strikers. [See *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130, 144 (2nd Cir. 1982).]

The Decision in *NLRB v. Randel—Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978) which was cited by Respondent must be distinguished. In *Randal Eastern* the Union did not agree to a contract before the employer withdrew it final offer. As in this case, *Randal Eastern* hired replacements during an economic strike and several returning strikers resigned from the Union. However, the record does not show substantial

repudiation or factors permitting an inference of repudiation of the Union to the extent found in *Randal Eastern*. In *Randal Eastern* 19 of the 46 returning strikers resigned from the Union. Here only 15 of 147 resigned. In *Randal Eastern* some of the 47 permanent replacements indicated disinterest in the Union. Here the record does not show the number of replacements that were actually working on 9 April, but there was no probative evidence showing that a substantial number of the replacements expressed disinterest in the Union. Finally, although one striker indicated that he would not return absent an acceptable settlement, there was no evidence showing that anyone declined the right to reinstatement. On 8 April the Union made an unconditional offer on behalf of all strikers to return to work. In *Randal Eastern* the Union told the employer that 20 percent of the strikers would not return to work.

The facts herein demonstrate and I find that Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union.

The Union's 8 April letter requested that Respondent furnish a listing of all unit employees along with information as to each of those employees. That information is necessary for the Union to accomplish its duties as bargaining representative. As an employer, the Respondent has an obligation to provide information that is needed by the bargaining representative for the proper performance of its duties. In view of my other findings herein, it is apparent, and I find that Respondent also violated Section 8(a)(1) and (5) by refusing to supply the Union with the requested information (*Cowles Publishing Co.*, 280 NLRB No. 105 (1986), and cases cited therein).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to sign the agreement designated by Respondent's final offer and agreed to on 8 April 1986, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By withdrawing recognition from the Union as the representative of the employees in the aforementioned bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to furnish the aforesaid labor organization with the information requested by it on 8 April 1986, regarding employees in the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practice are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices, I shall recommend, pursuant to Section 10(c) of the Act, that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The record is unclear whether Respondent instituted all the added benefits included in its final offer. If nec-

essary, that question may be resolved in compliance proceedings and, if it is determined that Respondent failed to implement all added benefits, the remedy herein shall act to restore the status quo ante in accord with the terms of the agreed to collective-bargaining agreement effective 8 April 1986, as shown in *Turnbull Enterprises, Inc.*, 259 NLRB 934 (1982); and Ogle Protection Service, *Inc.*, 183 NLRB 682 (1970).[2]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

Respondent, Bickerstaff Clay Products, Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to execute the collective-bargaining agreement with the Laborers' Local Union No. 246, which was agreed to on 8 April 1986.

(b) Withdrawing recognition on 9 April 1986 and refusing to recognize and bargain with Laborers' Local Union No. 246 as a representative of the following unit:

> All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding the Material Handling Dixision, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

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[2] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Refusing to furnish the aforesaid labor organization with the information requested by it on 8 April 1986.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Execute forthwith the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

(b) Implement all the terms of the aforesaid collective-bargaining agreement and, if necessary, restore the status quo ante in accord with the provisons of the section of this Decision entitled "The Remedy."

(c) Upon request, bargain with the aforenamed labor organization as the exclusive representative of all employees in the aforesaid bargaining unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(d) Upon request, furnish the above-named labor organization with the information it requested on 8 April 1986.

(e) Post at its offices and places of business copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director, for Region 10, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 con-

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[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

secutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated at Washington, DC 15 December 1986

/s/ J. Pargen Robertson
J. PARGEN ROBERTSON
Administrative Law Judge

"Appendix"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize.
To form, join, or assist any union.
To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection.
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize Laborers' Local Union No. 246, as the exclusive bargaining representative of our employees in the following described appropriate bargaining unit:

All production and maintenance employees employed by Respondent at its Plants 1 and 2, Ceramic, Alabama; Plant 3, Dixieland, Alabama; and Plant 4 at Brick Yard, Alabama, including the Sample Department (Ceramic, Alabama), but excluding Material Handling Division, plant clerical employees, supervisors, office clerical and professional employees as defined in the Act.

WE WILIL NOT refuse to execute the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

WE WILL NOT refuse to furnish the above-named labor organization with information requested by it, by letter on 8 April 1986.

WE WILL, upon request, bargain collectively with the Union as exclusive representative of the employees in the appropriate unit described above regarding wages, hours, and other terms and conditions of employment.

WE WILL execute forthwith the collective-bargaining agreement with the Union which was agreed upon on 8 April 1986.

WE WILL, upon request, furnish the above-named labor organization the information it requested on 8 April 1986.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

BICKERSTAFF CLAY PRODUCTS, INC.
(Employer)

Date: ———————— By: ————————————
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, GA 30323

Telephone: (404) 331-2886